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No. 97-1985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ELLIS E. NEDER, JR., PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The government does not and cannot reconcile the Eleventh Circuit's harmless-error decision with *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) — in particular, *Sullivan*'s holding that "the entire premise of *Chapman* review is simply absent" where the jury renders an incomplete verdict because "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate." *Id.* at 280 (emphasis in original). In fact, the government concedes (at 30-31) that *Sullivan*'s holding precludes harmless-error review where, as here, the jury has failed to find the defendant guilty of every element of the crime, and where the appellate court thus would be forced to speculate what the jury would have found had it considered the element. The government thus resorts to an assault on *Sullivan* itself, arguing (at 25-26) that *Sullivan* cannot mean what it says, and that its carefully delineated harmless-error framework should be tossed aside. The government's attack on *Sullivan* not only is ill-conceived, but actually underscores the fact that the government's position cannot be reconciled with this Court's constitutional harmless-error jurisprudence.

The government's answer to its dilemma is to posit a far-fetched and unprincipled exception to *Sullivan*, suggesting that harmless-error review applies where the trial court removes "only a single element of an offense." U.S. Br. 13. The *number* of elements removed, however, is meaningless. "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of *all* the elements of the crime with which he is charged" *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995) (emphasis added). The government's novel claim naturally raises the question why, if it is constitutionally permissible to affirm a conviction where the jury has not found one of the elements of the crime, that would not also be true if two or more elements were removed. The government offers no answer.

The government also claims that this case is special because the court of appeals found that the element removed was "uncontested." That finding, however, reflects nothing more than the Eleventh Circuit's subjective view of the evidence. Petitioner did not plead guilty. Nor did he stipulate to any element. In fact, he insisted that materiality be decided by the jury. It is true, as the government notes, that petitioner's closing argument did not focus on materiality, but that

was inevitable, as the summation occurred *after* the trial court's directed verdict on that element. Under such circumstances, no reviewing court could constitutionally find that materiality was "uncontested." Indeed, for a reviewing court to declare materiality "uncontested" would be tantamount to declaring its removal harmless on the ground that the evidence concerning the element was "overwhelming" — a result plainly forbidden by *Sullivan*. Whether an error is amenable to harmless-error scrutiny has nothing to do with the strength of the *evidence*. It depends entirely on the nature of the *error*. A structural error is "not curable by overwhelming record evidence of guilt." *Carella* v. *California*, 491 U.S. 263, 270 (1989) (Scalia, J., concurring). In this case, the trial court's removal of materiality from the jury's consideration unquestionably qualifies as a structural error that defies harmless-error scrutiny.

2. Our opening brief demonstrated that materiality is an element of the federal mail, wire, and bank fraud statutes, 18 U.S.C. §§ 1341, 1343, 1344. Each statute prohibits a "scheme or artifice to defraud." It also is undisputed that the settled common-law meaning of the term "defraud" includes a materiality requirement. Thus, by using that term, Congress incorporated that materiality element into the mail, wire and bank fraud statutes based upon the "cardinal rule of statutory construction" that statutory language is presumed to carry its common-law meaning. Pet. Br. 30-35; *Molzof* v. *United States*, 502 U.S. 301, 307 (1992).

The government does not offer any evidence (and there is none, see Pet. Br. 35-48) of a contrary congressional intent that would rebut the presumption that the word "defraud" bears its normal common-law meaning —including the materiality requirement — in the mail, wire, and bank fraud statutes. Instead, the government invites this Court to abandon the canon of construction and to hold instead that common-law terms bear their common-law meaning only if additional textual evidence indicates that Congress actually meant to "codify" a common-law action. The government's invitation is both unprecedented and ill-conceived. The government also misreads *Durland* v. *United States*, 161 U.S. 306 (1896), as having resolved the question presented (which it plainly did not). And in the end, the

government tries to rewrite these statutes based on policy justifications that Congress never articulated. None of the government's arguments succeeds in overcoming the plain meaning of the mail, wire, and bank fraud statutes, which by using the term "defraud" undeniably require proof of a material falsehood.

I. THE REMOVAL OF AN ELEMENT FROM THE JURY'S CONSIDERATION CANNOT CONSTITUTIONALLY BE SUBJECT TO HARMLESS-ERROR REVIEW.

A. The Harmless-Error Doctrine Is Inapplicable When The Jury Has Not Rendered A Verdict On Every Element Of The Offense Charged.

In *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), and *Yates* v. *Evatt*, 500 U.S. 391 (1991), this Court carefully delineated the constitutional limits of harmless-error review. In each case, the Court emphasized that "[h]armless-error review looks * * * to the basis on which the jury actually rested its verdict.' * * * That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury trial guarantee." 508 U.S. at 279 (quoting *Yates*, 500 U.S. at 404). As the government acknowledges, under *Sullivan* "it is never appropriate to determine what a jury would necessarily have found in the absence of an error, as distinguished from what the jury actually did find despite that error." U.S. Br. 25. The government also concedes that "[a] logical extension of that reasoning would mean that harmless-error review in light of the record evidence is virtually impossible when the jury instructions entirely omit an element, because the jury instructions would not have authorized consideration of the evidence, insofar as it was relevant to that element at all." *Id.* at 26.

Unable to reconcile the Eleventh Circuit's harmless-error holding with *Sullivan*, the government takes the only course it can to preserve petitioner's tax fraud conviction: asking the Court to transform the harmless-error doctrine and allow appellate courts to uphold a conviction rendered on an incomplete guilty verdict so long as the jury instructions remove "only a single element of an offense." U.S.

Br. 13. The government simplistically reasons that because "this Court has refused to apply a rule of automatic reversal" to other instructional errors involving single elements (U.S. Br. 14), the complete omission of a single element *also* must be subject to harmless-error review. The government's analysis, however, entirely ignores *why* the Court found these particular "single-element" errors subject to harmless-error review. The Court's holdings in those cases had nothing to do with the *number* of elements at issue. Rather, it was the *nature* of the instructional error that allowed for harmless-error review.

A constitutionally incomplete verdict is a constitutionally incomplete verdict, regardless of whether it arises from the omission of one, two or three elements. *Gaudin* itself was a "one element" case. So was *Carpenters & Joiners* v. *United States*, 330 U.S. 395 (1947) (whose holding was reaffirmed in *Sullivan*). Yet nowhere did the Court suggest that the constitutional error in either case was somehow mitigated by the fact that it concerned "only one element." To the contrary, this Court reaffirmed the Constitution's requirement that a guilty verdict "rest upon a jury determination that the defendant is guilty of *every* element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 515 U.S. at 510 (emphasis added).

Apart from finding no support in this Court's precedents, the government's "one element" exception is wholly unprincipled. If the removal of a single element is susceptible to harmless-error review, why not two elements, or even three? The government never answers this obvious question, except to offers that its proposed exception would not apply if the trial court omits an "outcome determinative" element of the crime charged. U.S. Br. 17-18. But such a distinction is untenable. *Every* element is "outcome-determinative," since "[a] jury verdict that [the defendant] is guilty of the crime means, of course, a verdict that he is guilty of *each necessary element* of the crime." *California* v. *Roy*, 519 U.S. 2, 7 (1996) (Scalia, J., concurring) (emphasis in original).[1] If the jury has not found every

[1] The government claims that this Court's *per curiam* opinion in *Roy* "applied the same approach" to harmless-error review as *Pope* and *Rose*. U.S. Br. 15. Not so. *Roy* was a habeas corpus case in which the defendant failed to object to the instructional error at trial. The whole point of this Court's *per curiam* opinion (519 U.S. at 5), was that the *Chapman* harmless-error framework does not *apply* to habeas corpus cases, and that in such cases, courts must instead apply the stricter harmless-error test articulated in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993). Moreover, "[n]o one claim[ed in *Roy*] that the error at issue [was] of the 'structural' sort that 'def[ies] analysis by "harmless error" standards.'" 519 U.S. at 5.

element beyond a reasonable doubt, "there [is] no jury verdict within the meaning of the Sixth Amendment," and "[t]here is no *object*, so to speak, upon which the harmless-error scrutiny can operate." *Sullivan*, 508 U.S. at 280 (emphasis in original).

Unable to avoid *Sullivan*'s holding, the government ultimately resorts (at 27) to an attack on *Sullivan* itself, arguing that it conflicts with "a substantial body of contrary authority from this Court" that supposedly permits appellate courts to declare errors "harmless" based on speculation as to what the jury would have found absent the error. Indeed, the government even goes so far as to argue that *Sullivan* was wrong to prohibit such appellate speculation because a "reviewing court must determine how a reasonable jury *would have* rendered its verdict absent error" in order to engage in harmless-error review. U.S. Br. 28 (emphasis in original). The government cites nothing, however, to bolster its assault on *Sullivan*. And none of this Court's harmless-error decisions has *ever* permitted the sort of appellate conjecture over hypothetical jury verdicts advocated by respondent.

As *Sullivan* itself explained (508 U.S. at 280-281), the cases relied on by the government lend no support to its position because they *all* involved circumstances in which a *complete* verdict was entered by the jury on *all* elements, and it thus was possible for an appellate court to declare the error harmless on the ground that the jury's *actual findings* established the defendant's guilt beyond a reasonable doubt.[2] For instance, in *Rose* v. *Clark*, 478 U.S. 570, 579

[2] The government tries to distinguish *Sullivan* on the ground that the error here did not "vitiate[] *all* the jury's findings," U.S. Br. 22 (emphasis in original). If anything, however, the error here represents an even clearer

(1986) (a defective presumption case), this Court held that harmless-error review was permissible because the jury still "had to find [the defendant] guilty beyond a reasonable doubt as to every element" of the offense charged. The error could be harmless only because "the jury still was required to find the predicate facts to establish the element of malice beyond a reasonable doubt." *Sullivan*, 508 U.S. at 280-281 (quoting *Rose*, 478 U.S. at 580). Accord *Pope* v. *Illinois*, 481 U.S. 497, 503 (1987) ("The error in *Rose* did not entirely preclude the jury from considering the element of malice"); *Carella*, 491 U.S. at 273 (Scalia, J., concurring) (same).[3]

Likewise, the error in *Pope* (a misdescription case) was subject to harmless-error review because the jury's findings were "functionally equivalent" to a finding of the actual element: "no rational juror could plausibly have found the magazines utterly lacking in value under a community standard and come to a different conclusion under a reasonable person standard." *Carella*, 491 U.S. at 270 (Scalia, J., concurring).[4] Here, that plainly did not occur. As the government

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example of structural error than *Sullivan*. As Chief Justice Rehnquist noted in *Sullivan*, one could debate whether the error in *Sullivan* was structural because it did not "remove[] an element of the offense from the jury's consideration or prevent[] the jury from considering certain evidence." 508 U.S. at 283-284 (concurring opinion). Here, however, the trial court's error *did* entirely remove an element from the jury's consideration.

[3] Despite its concession that materiality was never considered by the jury "at all," the government absurdly suggests (at 16) that the error involved only a "misdescription." While the line between misdescriptions and omissions may sometimes be difficult to discern, there is no such problem here. This is not a case like *Pope* in which the jury was instructed to consider an element using an erroneous definition. Instead, the jury was expressly told not to consider the element at all. J.A. 249-256. That is hardly a "misdescription."

[4] The government obliquely suggests (at 31 n.14) that the jury's findings below were "functionally equivalent" to a finding of materiality. But as this Court explained in *Sullivan*, functional equivalence occurs only where the jury *actually finds* the omitted element through other elements or charges.

admits, "the jury here did not deliberate on the materiality element at all, while the jury in [*Rose* and *Pope*] did deliberate on the element at issue, albeit under inadequate instructions." U.S. Br. 30-31.

In short, contrary to the government's submission, this Court's harmless-error decisions have never permitted, much less required, appellate speculation regarding what a jury would have found in the absence of the error. As this Court made clear in *Sullivan* and *Yates*, an error is subject to harmless-error review only if the jury's *actual findings* established the defendant's guilt notwithstanding the error. Thus, where, as here, an element is removed from the jury's purview, the error "can be harmless only if the jury's verdict on other points effectively embraces [the element] or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well." *Roy*, 519 U.S. at 7 (Scalia, J., concurring) (emphasis in original). Here, however, the jury did not make *any* findings concerning the materiality element of the tax fraud charge. Petitioner's tax fraud conviction must therefore be reversed.

B. Removal Of An Element Cannot Be Cured By An Appellate Court's Finding That The Element Was "Uncontested" Or "Incontrovertible."

The government urges this Court to hold that removal of an element can be declared harmless if the appellate court determines beyond a reasonable doubt that the element was "uncontroverted and established by overwhelming proof." U.S. Br. 25. This position is both unprecedented and untenable. Indeed, the government's "test" entirely skips over the first part of *Chapman's* harmless-error inquiry. Whether an element is "uncontested" or "incontrovertible" bears only on the second prong of *Chapman*'s inquiry, *i.e.*, whether the error was harmless — not whether it is subject to harmless-error review in the

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508 U.S. at 281. In this case, by contrast, the government concedes (at 30-31) that the jury never considered materiality "at all," and that none of the other elements or charges required it to make the finding of materiality. While the government may argue that the alleged failure to report income is material, the inescapable fact remains that the jury never considered that issue.

first place. The government would have the Court do away with the first *Chapman* step, and thus declare that any error which is "harmless" based on the evidence must, *ipso facto*, be amenable to harmless-error scrutiny. As *Sullivan* made clear, however, the availability of harmless-error review has nothing do with the evidence.

The government conceded last Term in *Rogers v. United States*, No. 96-1279, that the first question in any harmless-error case is whether the error is "amenable to harmless-error review at all." Br. of United States, at 15.[5] Accord *Chapman* v. *California*, 386 U.S. 18, 20 (1967). Only if the harmless-error doctrine can constitutionally be applied may the appellate court then address whether the error actually was harmless. *Sullivan*, 508 U.S. at 280. Whether an error is of the "structural" sort that "def[ies] analysis by 'harmless-error' standards" (*Arizona* v. *Fulminante*, 499 U.S. 279, 307-309 (1991)), has *nothing* to do with the evidence. A "structural" error, by definition, "require[s] reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577. For example, when a jury is constituted in a racially discriminatory fashion (see *Vasquez* v. *Hillery*, 474 U.S.

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[5] Citing *Johnson* v. *United States*, 520 U.S. 461 (1997), and *Bank of Nova Scotia* v. *United States*, 487 U.S. 250 (1988), the government claims (at 11) that all constitutional errors are subject to harmless-error review under Fed. R. Crim. P. 52(a). Neither case supports that proposition. *Nova Scotia* merely held that, *when applicable*, a reviewing court cannot refuse to engage in harmless-error review. Whether the error below is subject to harmless-error review, however, is purely a function of constitutional "principles [that] necessarily circumscribe the availability of harmless-error analysis." *Carella*, 491 U.S. at 269 (Scalia, J., concurring). The government's reliance on *Johnson* also is misplaced. *Johnson* was a plain error case in which this Court held that the defendant had forfeited her constitutional right to a jury determination of the omitted element under Rule 52(b) by failing to preserve the error for appeal. In any event, the government's reliance on Rule 52(a) is unavailing since, under *Sullivan*, the right to a jury determination on every element of the offense plainly is a "substantial right[]" that may not be disregarded under Rule 52(a). See *Roy*, 519 U.S. at 7 (Scalia, J., concurring). See also *United States* v. *Ladish Malting Co.*, 135 F.3d 484, 490 (7th Cir. 1998) (Easterbrook, J.).

254 (1986)), or a defendant is denied a public trial (see *Waller* v. *Georgia*, 467 U.S. 39 (1984)), it makes no difference that an appellate court may believe the evidence of guilt is "overwhelming." Such errors are structural, and hence not susceptible to harmless-error review, "no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. That is why a trial court "may not direct a verdict for the State, no matter how overwhelming the evidence." *Ibid.*[6]

Where, as here, the jury has not found the defendant guilty of every element of the offense charged, the error is "structural," and thus immune from harmless-error scrutiny regardless of the evidence. There is nothing an appellate court can do to alter the fact that "the wrong entity judge[d] the defendant guilty." *Sullivan*, 508 U.S. at 281. No amount of evidence can show that the jury found what it never considered — or, as in this case, was instructed *not* to find.

The government's self-serving (and incorrect, see Pet. Supp. C.A. Br. 23-29) assertion (at 25) that the jury's "verdict would surely not have been different if the jury had been required to make a finding on materiality" is beside the point. "The absence of a formal verdict on [an element] cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise." *Roy*, 519 U.S. at 7 (Scalia, J., concurring). "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." *Sullivan*, 508 U.S. at 280. Where, as in this case, the trial court directs a verdict on an element, and instructs the jury not to consider it, the evidence pertaining to that element becomes meaningless,

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[6] The government tries to deny (at 21) that the trial court's removal of materiality from the jury's consideration, and its own explicit finding of materiality, constituted a directed verdict. As Justice Powell explained, however, "[a] directed verdict *removes an issue* completely from the jury's consideration" and "permits a jury to convict a defendant 'without ever examining the evidence concerning an element of the crimes charged.'" *Connecticut* v. *Johnson*, 460 U.S. 73, 95-96 (1983) (dissenting opinion) (emphasis added). That is exactly what occurred here.

> [f]or nothing in the instruction would have directed the jury, or even permitted it, to consider and apply [the evidence concerning that element] in reaching its verdict. And the problem would not be cured by an appellate court's determination that the record evidence unmistakably established guilt, for that would represent a finding of fact by judges, not by a jury.

Carella, 491 U.S. at 269 (Scalia, J., concurring) (citing *Rose*, 478 U.S. at 578).

The government's proposal also rests upon the false assumption that an appellate court can constitutionally declare an element "uncontested" despite the defendant's not-guilty plea and specific request that the jury be instructed to consider that element. Any such finding by an appellate court would itself be unconstitutional. "In the federal courts, '[a] simple plea of not guilty * * * puts the prosecution to its proof as to all elements of the crime charged.'" *Estelle* v. *McGuire*, 502 U.S. 62, 69-70 (1991) (citation omitted). Thus, "a defendant in a criminal trial is justified, of course, in defending solely in reliance on the presumption of his innocence and the State's burden of proof." *Connecticut* v. *Johnson*, 460 U.S. 73, 87 n.16 (1983) (plurality opinion). The government's view would make a mockery of these bedrock constitutional principles, granting appellate courts the unfettered power to declare "uncontested" any element that a defendant fails to defend to the appellate court's satisfaction. Indeed, how is a reviewing court even to judge whether an element is "uncontested"? Here, for instance, the government relies on the content of petitioner's closing argument. U.S. Br. 5. But by the time closing arguments were delivered, the trial court already taken materiality away from the jury. It would therefore have been pointless — indeed, objectionable — for defense counsel to have argued about materiality to the jury. In short, removal of an element from the jury's consideration cannot constitutionally be cured by an appellate court's finding that the element was "uncontested" or "incontestible."

C. Reversal Is Needed To Safeguard The Jury's Role As The Arbiter Of Guilt, And Would Not Have The Drastic Consequences Claimed By The Government.

The government also claims that reversal of petitioner's tax fraud conviction would have "sweeping consequences for this Court's jurisprudence," and would "mandate reversal for virtually any error in defining the elements of the offense." U.S. Br. 31-32. That is simply not true. Reversal would only be required if the jury's other findings are not "functionally equivalent" to a finding on the element in question. *Sullivan*, 508 U.S. at 281. Moreover, under *Johnson* v. *United States*, 520 U.S. 461 (1997), removal of an element would require reversal only in the rare circumstance when the defendant timely objects to the instructional error and the trial court nonetheless erroneously refuses to instruct the jury to consider that element.

The government also is wrong in arguing (at 32) that reversal of petitioner's tax fraud conviction "serves no sufficient purpose." Quite the contrary, reversal is necessary to safeguard the constitutional right to a jury trial itself. As this Court explained in *Sullivan*, 508 U.S. at 277, that right "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilt." The government, however, advocates the unprecedented step of allowing appellate judges to become finders of fact on elements that the jury never was permitted to consider. To cross that line, however, would irreversibly impair the right to a jury trial. Far from promoting public disrespect for the judicial system, reversal of petitioner's tax fraud conviction and a new trial would reassure the public of the jury's continuing role as the exclusive arbiter of guilt or innocence in our constitutional system of justice.

II. MATERIALITY IS AN ELEMENT OF THE MAIL FRAUD, WIRE FRAUD, AND BANK FRAUD STATUTES.

A. The Statutes' Plain Language Shows That Materiality Is An Element Of Mail, Wire, And Bank Fraud.

1. In our opening brief, we showed that the plain language of the mail, wire, and bank fraud statutes includes materiality as an element of those crimes. Each statute prohibits a "scheme or artifice

to defraud." It also is undisputed that the term "defraud" has always had a fixed common-law meaning that includes materiality. Pet. Br. 33-35. See, *e.g.*, *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 579 (1996). Thus, because the Court "presume[s] that Congress incorporates the common-law meaning of the terms it uses if those terms * * * have accumulated settled meaning under * * * the common law," the mail, wire, and bank fraud statutes must be read to require materiality absent evidence of a contrary congressional intent. *United States* v. *Wells*, 519 U.S. 482, 491 (1997); Pet. Br. 32-33. There is no evidence, however, to rebut the presumption that the mail, wire, and bank fraud statutes require proof of materiality. In fact, the historical antecedents of these crimes, legislative history, early case law, and surrounding statutory language all reinforce the presumption. Pet. Br. 35-47.

The government concedes that common-law fraud requires proof of materiality, and that "courts generally 'presume that Congress incorporates the common-law meaning of the terms it uses.'" U.S. Br. 36-37. The government, however, posits that the word "defraud" would bear its common-law meaning in the mail, wire, and bank fraud statutes only if the statutes "indicated that Congress had codified the crime of false pretenses or one of the common-law torts sounding in fraud." U.S. Br. 37. The government thus would have this Court abandon the very canon of construction that it recently sought to enforce in *Wells*.

Application of the canon that statutory language is presumed to carry its common-law meaning to a particular statute does not depend on a manifest congressional intent to "codify" a common-law action. For example, in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-740 (1989), and *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 322-323 (1992), this Court relied on the canon to find that the term "employee" in the Copyright Act and ERISA incorporated traditional agency law principles. These holdings did not rest on findings that the statutes were intended to "codify" common-law principles. See also, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978) (applying the canon to the term "legal * * * relief" in the ADEA, without finding that Congress "codified" common-law

principles). Rather, the canon is triggered *any time* "Congress uses terms that have accumulated settled meaning under * * * the common law." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981).

The government's demand for additional textual evidence that Congress meant to incorporate the elements of common-law fraud demonstrates a basic misunderstanding of the canon. The canon requires courts to "*presume* that Congress incorporates the common-law meaning of the terms it uses." *Wells*, 519 U.S. at 491 (emphasis added). That presumption would not be a *presumption* if *additional* textual indications were required — beyond the use of language with a settled common-law meaning — of Congress's intent to incorporate the common-law meaning of the words it uses. Whenever Congress uses common-law terms like "defraud," "they imply elements that the common law has defined them to include. Congress could have enumerated their elements, but Congress's contrary drafting choice did not deprive them of a significance richer than the bare statement of their terms." *Field* v. *Mans*, 516 U.S. 59, 69 (1995).

Thus, the government misses the point by stressing that the mail, wire, and bank fraud statutes do not include the word "material." U.S. Br. 34, 49. The term "defraud" brings with it the common-law requirement of materiality. For that same reason, the government's observation (at 35-36, 49), that this Court has enumerated the elements of mail fraud using the word "defraud," but not the word "material" merely begs the question.

2. The government seizes upon statutes that use the words "material" and "fraudulent" in the same sentence, as supposed evidence that the statutes at issue here do not require proof of materiality. U.S. Br. 34 (citing 21 U.S.C. § 843(a)(4)(A) ("false or fraudulent material information"); 26 U.S.C. § 6700(a)(2)(A) ("statement" that is "false or fraudulent as to any material matter")). The existence of these statutes does not bolster the government's case.

The statutes cited by the government were enacted in 1970 and 1982 — a century *after* Congress' 1872 enactment of the original mail fraud statute and its use of the phrase "scheme or artifice to defraud." Pet. Br. 30-31 & nn.12-13. See also Pub. L. No. 91-513, Title II,

§ 403, 84 Stat. 1263 (1970) (21 U.S.C. § 843); Pub. L. No. 97-248, Title III, § 320(a), 96 Stat. 611 (1982) (26 U.S.C. § 6700). Subsequently enacted statutes have no bearing on Congress's meaning in 1872. See, *e.g.*, *Wright* v. *West*, 505 U.S. 277, 295 n.9 (1992) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

Moreover, even if they were relevant, the statutes cited by respondent would lend no support to its position. Both statutes precede the word "material" with the phrase "*false or* fraudulent." Because a "false" statement or "false" information need not be material (*Wells*, 519 U.S. at 490-491), the word "material" is necessary to limit the statutes' scope to material falsehoods. The government has not cited a single statute, and we are aware of none, that speaks solely of "material fraud." *All* frauds require a material falsehood. Other statutes, not cited by the government, make this clear. See 26 U.S.C. § 9803(a)(2) (referring to "fraud or *other* intentional misrepresentation of material fact") (emphasis added); 29 U.S.C. § 1183(2) (same).

3. If the government's view were adopted, materiality could *never* be an element of any statute that did not use the word "material." But in *Fedorenko* v. *United States*, 449 U.S. 490, 507 (1981), both the government and this Court agreed that a statute prohibiting certain "misrepresentation[s]," "only applie[d] to willful misrepresentations about 'material' facts" even though the statute did not use the word "material." Accord *Kungys* v. *United States*, 485 U.S. 759, 781 (1988) (the term "misrepresentation" is "commonly associated" with a materiality requirement, and implies a materiality element "in many contexts," including at common law). Similarly, as explained in our opening brief, this Court has long assumed that various provisions of the securities laws that do not use the word "material" include a materiality element. Pet. Br. 45-46. See, *e.g.*, *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988). The government makes no attempt to reconcile those decisions with its position here, other than to offer the meaningless observation that "there is already a substantial body of case law from this Court addressing" the materiality requirement under the securities laws. U.S. Br. 48. In fact, as the government concedes (at 44 n.23), until it filed its brief in this

case, even the Department of Justice believed that the mail fraud statute required proof of materiality, and had told Congress that "while not in the statutory language, 'materiality' is an element of bankruptcy fraud," just as it is an element of mail fraud. 140 Cong. Rec. H10773 (daily ed. Oct. 4, 1994).

B. The Government's Effort To Redefine Fraud Must Be Rejected.

1. The government claims that because the mail, wire, and bank fraud statutes do not require the government to prove reliance or damage (two elements of common-law fraud), prosecutors need not prove materiality. U.S. Br. 39-40. This argument rests on a misapprehension of the conduct that the statutes are meant to punish. The statutes do not address fraud itself, but rather *schemes* to defraud.

A scheme to defraud can exist before the fraud itself is carried out. But because the scheme must be one to "defraud," it must have as one of its ingredients a material falsehood. Without that element, it simply is not a scheme to "defraud." *Cf. Fasulo* v. *United States*, 272 U.S. 620, 629 (1926) (overturning mail fraud conviction because "the attempt was by intimidation and not by anything in the nature of deceit or fraud as known to the law or as generally understood").

Arguing that the falsehood associated with the scheme need not be material, the government divorces the mail, wire and bank fraud statutes from the concept of fraud entirely. The government's reading would expand the statutes to cover *any* sort of scheme. Indeed, if the word "defraud" does not restrict the statutes to schemes that involve material falsehoods, then "[t]here is no more reason" (U.S. Br. 39) to restrict the statutes to schemes involving falsehoods at all, or even to schemes involving the deprivation of property or services.

2. The government further confuses matters when it argues that the statutes punish a failed attempt to defraud because the defendant used a falsehood that "in the circumstances turns out to be immaterial to its intended victim." U.S. Br. 41. Because the persuasive power of the falsehood — its materiality — is a necessary element of "fraud," one who attempts to deprive another of property through a

course of conduct without a material falsehood is not engaged in a "scheme or artifice to defraud."

Thus, the government's analogy to an "impossible" attempted murder is misguided. See U.S. Br. 41. The means used to commit murder are irrelevant to whether the crime has been committed, and an attempted intentional killing by ineffective means is, therefore, still attempted murder. But the same is not true for fraud. An intentional deprivation of property is fraud only if it is accomplished by means of a material falsehood. One who succeeds in depriving another of property with an immaterial falsehood has not committed fraud. And, for the same reason, one who unsuccessfully attempts to deprive another of property by means of an immaterial falsehood has not attempted fraud.

3. Finally, the government attempts to recharacterize the mail fraud statute as punishing anyone "who intends to defraud someone, and who uses the mails in an effort to advance his scheme," whether or not the scheme involves material falsehoods. U.S. Br. 40. But, as noted above, the government misses the point. One who intends to undertake a course of conduct that does not involve a material falsehood does not intend to "defraud," just as one cannot intend murder without intending to kill the victim.[7]

C. The Government Misreads *Durland*.

The government's brief reflects a fundamental misunderstanding of this Court's decision in *Durland* v. *United States*, 161 U.S. 306 (1896). *Durland* held that a scheme to defraud can be premised on false and fraudulent promises, just as it can on any other type of

[7] As the Model Penal Code explains, when considering criminal attempt, it is not the defendant's subjective intent or beliefs that conrol, but rather whether the defendant's intended conduct actually fits the legal definition of the crime. Otherwise, "the law of attempt would be used to manufacture a new crime, when the legislature has left the situation outside the ambit of the law." Model Penal Code § 5.01 cmt. 3(c), at 318 (1985) (quoting G. Williams, CRIMINAL LAW: THE GENERAL PART 634 (2d ed. 1961)). See also *Staples* v. *United States*, 511 U.S. 600, 604 (1990).

misrepresentation. The government mistakenly invokes *Durland* for the proposition that the term "defraud," as used in the mail fraud statute, is broader than common-law fraud. U.S. Br. 37-38, 42. However, as explained in our opening brief (at 42-43), *Durland* never suggested that the statute encompassed more than common-law fraud. To the contrary, the *reason* why phony promises were found to violate the statute was precisely because they constituted "fraud" as that term was generally understood:

> The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. Punishment because of the fraudulent purpose is no new thing.

161 U.S. at 313. The *Durland* Court underscored the lack of novelty in its approach, explaining that "an intent to cheat the vendor * * * is a plain fraud, and made punishable as such by statutes in many of the states." *Ibid.* (quoting *Evans* v. *United States*, 153 U.S. 584, 592 (1894)). See also Pet. Br. 43 n.24 (explaining that common-law fraud reached false promises). Contrary to what the government would have this Court believe, *Durland* made no break with the common law.

Noting that the *Durland* court "looked to 'the letter of the statute' and 'the evil sought to be remedied,'" the government claims that "[i]n so doing, the Court concluded that it is 'the intent and purpose' of the defendant, rather than the precise nature of the misrepresentation, that is central to the offense of mail fraud." U.S. Br. 38. Crucially, however, the government omits what the Court actually said about "the evil sought to be remedied":

> [B]eyond the letter of the statute is the evil sought to be remedied * * *. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. * * * [A]ny scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.

161 U.S. at 313. The "evil sought to be remedied" by the mail fraud statute was not free-floating intent or immaterial falsehoods. It was, as the Court made clear, the proliferation of deceitful schemes that had a natural tendency to induce detrimental action by their victims — *i.e.*, schemes involving material falsehoods. See also Pet. Br. 43.[8]

The government thus is only half right in stating (at 38) that "*Durland* establishes that the mail fraud statute is not a codification of the common law of fraud or the crime of false pretenses." While *Durland* surely held that the statute extends beyond the crime of false pretenses, it certainly did *not* establish that the term "defraud" in the mail fraud statute was broader than common-law fraud.

D. The Government's Policy Arguments Are Unavailing.

The government devotes much attention to policy arguments about why materiality should not be an element of the mail, wire, and bank fraud statutes. U.S. Br. 43-50. But "[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco* v. *Commissioner*, 464 U.S. 386, 398 (1983). Even if they were relevant to the Court's inquiry, however, the government's policy arguments are uniformly unpersuasive.

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[8] The government further misinterprets *Durland* by claiming that "*Durland* held that the mail fraud statute * * * was intended to protect against all 'intentional efforts to despoil' through use of the mails." U.S. Br. 42. In fact, *Durland* stated that the statute was enacted "protect[] the public against all *such* intentional efforts to despoil." The word "such," which the government omits, is significant. It refers to a description of the defendant's scheme: "The charge is that * * * it was not the intent of the defendant to make an honest effort for its success, but that he *resorted to this form and pretense of a bond without a thought that he or the company would ever make good its promises.*" 161 U.S. at 314 (emphasis added). Thus, the language relied upon by the government specifically referred to an "intentional effort[] to despoil" that involved both materiality and intent: a pretense of a legitimate instrument and an intent to make off with investors' money. *Durland* does not support the government's conclusion that the statute was aimed at "*all* 'intentional efforts to despoil.'" U.S. Br. 42 (emphasis added).

1. The government insists that there are "sound reasons" for criminalizing immaterial falsehoods. U.S. Br. 45. Yet the government fails to identify any such reasons. All the government shows is that Congress would be "entitled" to pass statutes covering immaterial falsehoods. *Ibid.* But that goes without saying. See *Wells*, 519 U.S. at 489-499 (Congress did not make materiality an element of 18 U.S.C. § 1014). In the mail, wire, and bank fraud statutes, however, Congress chose language that reflects its judgment to forbid only schemes to "defraud" — *i.e.*, schemes involving material falsehoods.[9]

The government also contends that a materiality requirement would make little practical difference because the requisite "subjective intent * * * would rarely exist (or be capable of being proven) when the deceptive conduct was trivial in character." U.S. Br. 44. The government thus would have the Court believe that common-law materiality has never served any real purpose. This unsupported empirical claim cannot stand in the face of the common law's historic persistence in requiring proof of materiality to prevent unwarranted civil or criminal liability based on trivial, irrelevant, or implausible falsehoods. See ACLI Br. 26-30 (collecting cases).

The government also argues (at 46-47) that the common-law materiality requirement should be abandoned to protect the gullible from fantastic schemes. But a falsehood is material only when it "has a natural tendency to influence, or was capable of influencing, the decision *of the decisionmaking body to which it was addressed.*" *Kungys*, 485 U.S. at 770 (emphasis added). Reading the mail, wire, and bank fraud statutes, in accordance with their plain language, to include a materiality element thus provides no shelter for frauds

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[9] The government is not assisted by its citation (at 45) of *Kay* v. *United States*, 303 U.S. 1 (1938), which concerned a statute that punished persons who "make[] *any statement* knowing it to be false." *Id.* at 4 n.1 (emphasis added). The language of such a "false statement" statute removes materiality as an element of the crime. *Wells*, 519 U.S. at 489-491; *id.* at 495 (the "language of the statute in *Kay* was substantially like that" in *Wells*). The language of the mail, wire, and bank fraud statutes — which punish a "scheme or artifice to defraud" — demonstrates the opposite.

directed at naive victims. As *amici* point out, a materiality requirement "prevent[s] unwarranted liability for fraud based on" falsehoods that are implausible even from the perspective of the victim. ACLI Br. 29.

2. The government dismisses the concern that scrapping the materiality element would unjustifiably bring "puffing" or "seller's talk" within the scope of fraud statutes (ACLI Br. 27-28), arguing (at 46) that some courts have justified a "puffing" exception on grounds other than materiality. As the cases cited by *amici* show, however, in numerous jurisdictions the government's reading of the statutes would permit criminal prosecutions and frivolous civil litigation based on immaterial misrepresentations made in the course of a sales pitch.

Even more puzzling is the government's response to *amici*'s observation that removal of the materiality requirement would lead to improper civil liability under RICO. See ACLI Br. 18-21. The government does not deny that allowing civil suits without materiality would be wholly unacceptable. But because some courts have engrafted a reliance element onto civil RICO claims predicated by mail fraud, the government weakly proffers (at 48 n.28) that "the elements that are required in a civil RICO case may be distinct from the elements that are required in a criminal prosecution under a predicate statute." As the government concedes (at 48 n.28), however, even the courts that have identified a reliance requirement under RICO have done so because RICO plaintiffs must show that their injuries are "by reason of" prohibited conduct. 18 U.S.C. § 1964(c). See *Chisholm* v. *Transouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996). That language could not allow a court to impose a special materiality requirement in civil RICO cases. Thus, the prospect of baseless civil RICO suits, if materiality is removed from the fraud statutes, remains both genuine and immediate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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